

General Information Letter: Principles for determining whether compensation is "paid in this State" for purposes of allocation and withholding.

July 6, 1999

Dear:

This is in response to your letter dated June 11, 1999 to this office, in which you express concern regarding the appropriateness of withholding Illinois income tax from your compensation. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter you stated the following:

"Per a telephone discussion with the Illinois tax office last week, I am outlining my status regarding taxation by the state of Illinois:

- I have not lived in the state of Illinois for over 22 years
- I have my residence in the state of xxxxxxxx (moved from xxxxxxxxxx April 13, 1998.)
- I have a xxxxxxxx drivers license (xxxxxxxxxxxxxxxxxxxxxx)
- My current job title is Senior Research Associate, but it involves travel to provide technical support for customers in North America and world-wide approximately 80-85% of the time. Some of the time that I am not traveling is spent in my office at home.
- My Social Security number is; xxxxxxxxxxxxxx

My wife's (xxxxxxxxxxxxxxxxxxxx) social security number is: xxxxxxxxxxxxxx

The company I work for is headquartered in xxxxxxxxxxxxxxxxxxxxxx.

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"It is their contention that since I visit the home office, on average, a few days per month that I am subject to Illinois state tax. (They are not willing to establish a state tax code for me in xx.)

I currently do not have an office assigned to me at xxxxxxxxxxxxxxxxxxxxxx, but I do have a voice mail box at their headquarters.

I am seeking a full refund of all Illinois state income tax. (I would like to file an amended return for 1998.)

I would like to have xxxxxxxxxx stop withholding Illinois state income tax.

Please feel free to call me if you need additional information or want to discuss this data."

Response

Section 302(a) of the Illinois Income Tax Act (35 ILCS 5/101 et seq.; the "IITA") provides that:

All items of compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual who is a nonresident at the

time of such payment and all items of deduction directly allocable thereto, shall be allocated to this State.

Under this provision, a nonresident employee's compensation will be allocated to Illinois and subject to Illinois income tax to the extent such compensation is paid in this State. Whether an individual's compensation is "paid in this State" is determined under Section 304(a)(2)(B) by the application of three tests. Compensation is considered "paid in this State" if:

- (i) The individual's service is performed entirely within this State;
- (ii) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or
- (iii) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

It is assumed from the information contained in your letter that you are an employee of xxxxxxxxxxxxxxxxxxxxxxxx ("xxxxxxxxxx") receiving wages for the services you render, and thus you are paid "compensation" as that term is defined in Section 1501(a)(3) of the IITA. In your letter you indicate that your service for xxxxxxxxxxxxxxxxxxxxxxxx is not performed entirely within this State, therefore the first test under Section 304(a)(2)(B)(i) need not be considered. Under application of Section 304(a)(2)(B)(ii), it appears the service performed without this State is more than incidental to the service performed within this State, however, insufficient information has been provided regarding your service in Illinois to make a conclusive determination as to such. Likewise, the limited facts provided in your letter are insufficient for a conclusive determination under application of Section 304(a)(2)(B)(iii) to the situation you describe. This being said, from the facts that you have provided it appears likely that your compensation would be subject to withholding for Illinois income tax.

The Department has promulgated regulations in 86 Ill. Admin. Code Section 100.7010 ("IAC") to explain and aid in the application of the tests under Section 304(a)(2)(B). See 86 IAC Section 100.7010, a copy of which has been enclosed for your convenience. Where the tests of Sections 304(a)(2)(B)(i) and (ii) are inapplicable but the individual performs some of his service in this State, the individual's base of operations must be determined. If no base of operations exists or it is impossible to determine such, the place from which the individual's service is directed or controlled must be determined. 86 IAC Sections 100.7010(d) and (e). Where an individual's base of operations is within this State, his entire compensation is subject to withholding. If, however, his base of operations is without this State, none of the compensation will be subject to withholding. According to 86 IAC Section 100.7010(d)(2), base of operations refers to:

the place or fixed center from which the individual works. An individual's base of operations may be his business office (which may be maintained in his home), or his contract of employment may specify a place at which the employee is to receive his directions and

instructions. *In the absence of more controlling factors, an individual's base of operations may be the place to which he has his business mail, supplies, and equipment sent or the place where he maintains his business records. (Emphasis added)*

Where no base of operations exists, or it is impossible to determine the base of operations, the place from which an individual's service is directed or controlled will be the determining factor. If the place from which the service is directed or controlled is in Illinois, then the entire compensation will be subject to withholding. If such place is not in Illinois, then none of the compensation will be subject to withholding. An example of this, as provided in the regulations, is where a salesman has a territory widespread and indefinite to such an extent that he does not maintain a fixed business office but receives orders or instructions wherever he may happen to be. The determining factor will then be the place from which the direction or control over the salesman is exercised. 86 IAC Section 100.7010(e)(1)

Several facts recited in your letter render it likely that your compensation is paid in this State. Specifically, you state that you are present in Illinois a few days a month to visit the home office. This is presumably in furtherance of performing your service to xxxxxxxxxx. Therefore, some of your service is performed in this State. Secondly, you stated that you travel both in and outside North America "80-85% of the time" in the performance of your job. This would be a controlling factor and creates the presumption that you perform the majority of your work and receive your direction and control from xxxxxxxxxx during your travels, rather than at a fixed business office. Finally, xxxxxxxxxx is headquartered in Illinois. If it is the home office of xxxxxxxxxx that directs and controls your service, then such direction and control is exercised from this State. Thus, under the limited facts provided, it appears likely your compensation is considered paid in this State and is subject to withholding for Illinois income tax. You may contest this issue if you so desire by filing a claim for refund of what you consider to be overpaid Illinois income tax for taxable year 1998. Otherwise, we are constrained from granting the other relief you desire.

As stated above, this is a general information letter which does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Sincerely,

Jackson E. Donley
Senior Counsel -- Income Tax